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Supreme Court, U.S.
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No. 03-949

In the
Supreme Court of the United States
October Term, 2003

ANHEUSER-BUSCH, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

REPLY BRIEF TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner Anheuser-Busch, Inc. ("ABI") submits this reply brief to respond to a single point raised in the Brief for the National Labor Relations Board In Opposition to ABI's petition for certiorari, namely that the issue presented is insubstantial.

In a footnote at the end of its Opposition, the National Relations Board ("Board") submits to the Court that further review is not necessary in this case because "it is unclear whether the issues presented to this Court by petitioner arise 'in the context of meaningful litigation.'" Opp., p. 19 n.10 (citing *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959)). However, the issues raised in the Petition are in no way moot. The Board continues to hold ABI accountable for an alleged violation of Section 8(a)(1) of the National Labor Relations Act, and ABI continues to assert that it did not violate the law when it provided a *Weingarten* representative to employee Patrick Lamirande, although not Lamirande's preferred representative. Resolution of the issue in this case, whether by this Court or by the Court of Appeals for the Fourth Circuit if review is denied, will determine the scope of the *Weingarten* right for all employers with union-represented employees.

Apparently recognizing the far-reaching impact of its rule, the Board attempts to portray its decision here as a minor gloss on the *Weingarten* rule. But its own explanation for the result reached in this case reveals the contrary. First, the Board explains the issue away by confusing the issue presented in this case, whether an employee is

entitled as a matter of federal labor law to a particular *Weingarten* representative, with the right of the union under Section 8(a)(5) to select its own representative. The Board argues that it is the right of the union to determine who will serve as representative when two stewards are available (Opp., p. 9), but the issue the administrative law judge thought he was deciding was the "limits of an *employee's* rights under *Weingarten*."[1] (A-53) (emphasis added).

More importantly, the Board's decision will complicate what historically has been a straightforward rule in application, but without identifying any policy reward. As to every request for a particular *Weingarten* representative, a manager will have to determine whether the requested representative is "available" and whether extenuating circumstances warrant rejecting the request. Opp., p. 9. If a manager determines that the requested representative is unavailable and offers a different representative, the manager runs the risk of having the Board determine after-the-fact that the interview should have been postponed until the requested representative became available. The Board does not dispute that its decision here may result in increased litigation in this regard, but

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[1] The Board cites to *Barnard College*, 340 NLRB No. 106 (Oct. 21, 2003), as stating that it is the right of *both* the union and the employee to select the representative, thereby mooting *Weingarten* and its progeny.

claims that such litigation results only from the fact that the question of exceptional circumstances is a "narrow exception." Opp., p. 13. The Board simply misses the point. As articulated by the Court, the *Weingarten* right is easy for managers to apply with little interference with management prerogatives to investigate employee misconduct. The Board's willingness to complicate that scheme without any good statutory basis for doing so will disrupt rather than further labor-management relations. And, still, the Board never explains the importance of having an employee represented by the particular representative of his choice.

Finally, the Board suggests that if an employer does not like its new rule, it can forego an investigatory interview altogether. Opp., p. 12. That ignores the realities of the workplace. In a unionized environment, decisions to discipline or discharge an employee for misconduct often must be based upon "just cause." Employers bear the burden of proof at arbitration that the employee engaged in the alleged wrongdoing, and the employer's unwillingness to learn an employee's version of events could be viewed by an arbitrator as an unreasonable investigation into the alleged misconduct. Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works*, pp. 905, 919 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997).

CONCLUSION

For the reasons set forth above and in its Petition, ABI respectfully requests that the Court grant the petition for writ of certiorari.

Respectfully submitted,
ANHEUSER-BUSCH, INC.

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